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In the Supreme Court of the United States

OCTOBER TERM, 1992

RONALD D. GRAF, *Petitioner*,

v.

UNITED STATES, *Respondent*.

ERIC J. WEISS AND ERNESTO HERNANDEZ,
Petitioners,

v.

UNITED STATES, *Respondent*.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

PETITIONERS' REPLY BRIEF

ALAN B. MORRISON
Counsel of Record in No. 92-1482
PUBLIC CITIZEN
LITIGATION GROUP
2000 P Street, N.W.
Washington, D.C. 20036
(202) 833-3000

EUGENE R. FIDELL
Counsel of Record in No. 92-1102
FELDESMAN, TUCKER, LEIFER,
FIDELL & BANK
2001 L Street, N.W.
Washington, D.C. 20036
(202) 466-8960

RONALD W. MEISTER
MEISTER LEVENTHAL
& SLADE
777 Third Avenue
New York, N.Y. 10017
(212) 935-0800

PHILIP D. CAVE
DWIGHT H. SULLIVAN
NAVY-MARINE CORPS APPELLATE DEFENSE DIVISION
Washington, D.C. 20374-1111
(202) 433-4161

Counsel for Petitioners

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PETITIONERS' REPLY BRIEF

These cases present related, recurring and important issues concerning the military trial and appellate benches. The Appointments Clause violation addressed in No. 92-1482 and the terms-of-office issue presented in both petitions have a synergistic, negative impact on judicial independence in the armed forces. The issues are ripe and properly presented. Both petitions should be granted.

1. The government's opposition in No. 92-1482 is much more significant for what it does *not* say than for what it *does* say. Nowhere does it suggest that the Appointments Clause issue is not an important one, or that the question is not properly and squarely presented. Nor does it suggest that there is any reasonable likelihood that a conflict in the Circuits will develop, or that there is any other reason to allow the issue to percolate further in the lower courts. Nor does it attempt to rebut our argument that the decision below would permit agencies to appoint staff attorneys as administrative law judges without complying with the Appointments Clause for that judicial office. And the opposition makes no effort to defend the position of Judge Crawford—that the Appointments Clause has no bearing on military appointments—even though she provided the decisive vote for the government in the court below.

Moreover, the government does not attempt to respond to our synergy argument—that the Appointments Clause and due process violations compound one another, especially because the Judge Advocate General, who is responsible for military prosecutors, also supervises and appoints military trial and appellate judges. Accordingly, the Appointments Clause violation is not simply a technical matter, but one which goes to the heart of the issue of independence of all military judges, both because of the dual role played by Judge Advocate General and because it is he, and not a politically accountable superior, who decides who shall serve as military judges, in which positions, and for how long.

2. In defending the result below, the government relies in No. 92-1482 almost entirely on the one hundred year old decision in *Shoemaker v. United States*, 147 U.S. 282 (1893), which involved a one-time challenge to a statute that added new, but germane, duties to an existing office, but which did not require the reconfirmation of the incum-

bent officeholders. Not only is that case factually distinguishable from the ongoing appointment of military judges at issue here, but it was decided long before this Court's modern Appointments Clause cases from *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), through *Morrison v. Olson*, 487 U.S. 654 (1988), and on to *Freytag v. Commissioner of Internal Revenue*, 111 S. Ct. 2631 (1991). Rather than supporting a denial of certiorari, the slimness of the government's defense on this important issue provides an additional basis for concern and hence a need for review by this Court.

3. The two judges of the Court of Military Appeals who found that the Appointments Clause had been satisfied did so primarily because of what they saw to be the close relation between the office of military lawyer, whether or not serving in the pre-1968 position of "law officer," and the new office of military judge. But the government's defense of the result below in No. 92-1482 takes a more sweeping approach under which an initial appointment as a military officer, that admittedly meets the requirements of the Appointments Clause, validates any subsequent assignment as a military judge. Thus, under the government's analysis, an individual commissioned as a Second Lieutenant and assigned to an infantry platoon could be assigned as an appellate judge on a Court of Military Review, with no further steps required under the Appointments Clause.[1]

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[1] The requirements in UCMJ art. 26(b), 10 U.S.C. § 826(b) (1988), that a military judge be a member of a bar and certified by the Judge Advocate General, do not affect the Appointments Clause analysis since they are simply additional requirements for that office, but do not satisfy, or serve as a substitute for, the requirements of that Clause. Nor is the notion of an infantry officer being admitted to the bar far-fetched: scores of military officers go to law school at night while in the service, because of in-service or post-service opportunities.

If accepted, this argument would allow all agencies, not just the military, to shift personnel around without any regard for the Appointments Clause, once the person was duly appointed. While an appointment to an inferior office would not obviate Senate confirmation, nothing would prevent the President from reassigning a duly confirmed Assistant Secretary of State for Latin America to cover the Near East or from being designated Ambassador to Russia, or bar the Assistant Attorney General in charge of the Civil Rights Division from being assigned to head the Criminal Division. Indeed, even the unstated limitation on inter-agency reassignments that the Court of Military Appeals' plurality imported through its requirement of germaneness would evaporate under the government's "one confirmation covers all" approach to Appointments Clause issues. While the government purports to retain the concept of germaneness, Weiss Opp. 9, its view that the duties of all military officers are germane to the duties of a military trial or appellate judge robs the term of virtually any meaning, and surely expands it far beyond that given by the plurality below or by this Court in *Shoemaker*.

4. Turning now to the other question presented, respondent, like the court below, has made no effort to show that military exigencies preclude fixed terms of office for military judges. The government has thus abandoned the one justification it even attempted in the lower court—that the allegedly ephemeral nature of courts-martial prevents the use of fixed terms. This retreat requires that it defend on the more fundamental ground that due process tolerates reliance on at-will judges in *any* system of criminal justice. But the government has also failed to offer any meaningful defense of this proposition. Thus, it blandly notes that "[s]tates are free to select terms of office for persons who hold any such position." Graf Opp. 7. This formulation, of course, does not address whether the states are equally free to decide to give their judges *no*

fixed term at all, as the military does. The petition in No. 92-1102 surveys the cases, Graf Pet. 9 n.9, 14-15 & n.18, and stands unrebutted. It is not enough simply to proclaim that the military is "a specialized society separate from civilian society," Graf Opp. 7, and deem the discussion at an end.

5. Equally conspicuous is the absence of any effort by the government to show that the practice here at issue satisfies *Mathews v. Eldridge*, 424 U.S. 319 (1976). Rather, the government places all its eggs in the basket of *Medina v. California*, 112 S. Ct. 2572 (1992), even though it also argues that Fifth and Fourteenth Amendment due process are fungible because both clauses employ the same four-word formula. Graf Opp. 7 n.5. There are two problems with that argument. First, it fails to explain why the Court was as divided as it was in *Medina* and why the Court of Military Appeals thought it made a difference and suggested a need for clarification. Second, Fourteenth Amendment jurisprudence, including *Medina*, reflects the special role of federalism—a factor that is entirely irrelevant under the Fifth Amendment. Because of this important distinguishing feature, the balance ultimately struck may be somewhat different in Fourteenth Amendment cases. If there is an anomaly in any of this, it would lie in subjecting noncriminal federal actions such as those involved in the work of Social Security Administration administrative law judges to stricter due process scrutiny than felony cases such as Airman Graf's court-martial.

6. The military's judicial arrangements—not dictated by any statute—are a dramatic and obvious departure from the norms of our legal tradition. Graf Pet. 9, 13-17. Following in the Court of Military Appeals' footsteps, the government pitches its argument on the proposition that "[f]or more than 300 years, neither English nor American military judges have enjoyed tenure in that office." Graf Opp. 6. As we have already explained, however, the office

of military judge only dates to 1968. Graf Pet. 8 n.7, 13 & n.14. Indeed, the very treatise relied on by the government long ago pointed out that "the judge advocate in our procedure [is] *neither a judge*, nor, properly speaking, an advocate, but a prosecuting officer with the added duty of legal adviser to the Court, and a recorder" (emphasis added). William Winthrop, *Military Law and Precedents* 179 (2d ed. 1920). The limited function of the "judge advocate" as a mere advisor to the court-martial members is clear from Colonel Winthrop's description. *Id.* at 194. That advisory function is a far cry from the decisive power expected to be exercised by federal and state judges and, at least since 1968, by military trial and appellate judges. Because the "judge advocate" of olden days was no more a judge than the Solicitor General is a general, the history cited by the government and the court below is of no value in determining what due process requires.[2]

The government gains even less ground from *Herrera v. Collins*, 113 S. Ct. 853 (1993), because in fact that decision directly supports petitioners' due process argument. There, in determining the application of due process to Texas's new trial practice, the Court went far beyond that one state's jurisprudence, surveying English,

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[2] The government's statement of the case in No. 92-1102 implies that Airman Graf was not harmed by the systemic defect because he elected to plead guilty and be sentenced by the court-martial members instead of the judge. Graf Opp. 4 (¶ 3). The implication is irrelevant because prejudice need not be shown in cases involving systemic defects. *Arizona v. Fulminante*, 111 S. Ct. 1246 (1991); *see* Graf Pet. 7 n.5. In any event, the trial judge was much more than a mere spectator. He made a variety of important rulings, framed instructions for the sentencing phase, regulated the taking of evidence and the conduct of argument, and generally did the kinds of things a trial judge does during that important stage of a case. Airman Graf also had a right to Court of Military Review judges who were independent. Notwithstanding his guilty plea, they still had a duty to review his legal arguments and to determine whether his sentence was appropriate. UCMJ art. 66(c), 10 U.S.C. § 866(c) (1988).

colonial, early and current state practice, early federal legislation, and the evolution of Fed. R. Crim. P. 33. *Id.* at 864-66. This is precisely the kind of broad, multijurisdictional inquiry petitioners suggest, Graf Pet. 13-17, and precisely what the Court of Military Appeals and the government have refused to do. If *Herrera*'s unwillingness to confine the due process analysis only to the *Texas* law of new trials illustrates the correct use of legal tradition under *Medina*, the decisions below clearly do not.[3]

7. The government advances a superficially appealing textual argument which, upon analysis, proves to be entirely untenable. It suggests that since the Constitution elsewhere prescribes particular terms of office for the President, Vice President, Senators, Congressmen and Article III judges, due process cannot make any terms-of-office demands for other officials such as military judges. Graf Opp. 6 & n.4. If the Constitution were read in the cramped fashion suggested by this *expressio unius* argument, none of the specific guarantees of the Bill of Rights would ever have been applied to the states. *See Palko v. Connecticut*, 302 U.S. 319 (1937). Nor would Fifth Amendment due process have been found to contain an equal protection component, since that concept appears *in haec verba* only in the Fourteenth Amendment. *Bolling v. Sharpe*, 347 U.S. 497 (1954). Similarly, because the Contract Clause applies on its face only to the states, the government's mechanical approach would preclude finding an analogous restriction on the federal government in Fifth Amendment due process. Yet the cases recognize such a restriction, even though the Framers explicitly refused to subject federal legislation impairing private contracts to the

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[3] *Herrera* is also noteworthy because the Court correctly found the states' present practices too divergent to count for much in the due process equation. In sharp contrast, as far as we can determine, no state uses at-will judges in felony cases.

literal requirements of the Contract Clause. *Pension Benefit Guaranty Corp. v. Gray & Co.*, 467 U.S. 717, 733 & n.9 (1984) (proposal to extend Contract Clause to federal government failed for lack of a second at 1787 Convention).

8. Finally, the government relies on what it describes as "Congress's decision not to grant tenure to military judges." Graf Opp. 10. Congress has made no such decision. The government cites nothing to indicate that Congress made any specific determination as to the need for terms of office when it created the military bench. Congress later commissioned a study of the matter, among others, Military Justice Act of 1983, Pub. L. No. 98-209, § 9(b)(1)(D), 97 Stat. 1404, but has yet to hold a hearing on the subject. Because of the divers plausible explanations for the lack of congressional action,[4] it is improper to draw inferences from it one way or the other. *E.g., Patterson v. McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989); *Girouard v. United States*, 328 U.S. 61, 69 (1946). In any event, even if Congress's inaction were properly viewed as a "decision" to approve the services' practice of requiring military judges to serve without the protection of fixed terms, that would not absolve this Court of its duty to enforce the Constitution's guaranty of due process.

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[4] These include "(1) approval of the status quo, as opposed to (2) inability to agree upon how to alter that status quo, (3) unawareness of the status quo, (4) indifference to the status quo, or even (5) political cowardice." *Johnson v. Transportation Agency*, 480 U.S. 616, 671-72 (1987) (Scalia, J., dissenting).

CONCLUSION

For the foregoing reasons and those previously stated, certiorari should be granted and the cases should be consolidated for argument.

Respectfully submitted.

ALAN B. MORRISON
Counsel of Record in No. 92-1482
PUBLIC CITIZEN
LITIGATION GROUP
2000 P Street, N.W.
Washington, D.C. 20036
(202) 833-3000

EUGENE R. FIDELL
Counsel of Record in No. 92-1102
FELDESMAN, TUCKER, LEIFER,
FIDELL & BANK
2001 L Street, N.W.
Washington, D.C. 20036
(202) 466-8960

RONALD W. MEISTER
MEISTER LEVENTHAL
& SLADE
777 Third Avenue
New York, N.Y. 10017
(212) 935-0800

PHILIP D. CAVE
DWIGHT H. SULLIVAN
NAVY-MARINE CORPS APPELLATE DEFENSE DIVISION
Washington, D.C. 20374-1111
(202) 433-4161

FRANKLIN J. FOIL
LISA M. HIGDON
NAVY-MARINE CORPS APPELLATE DEFENSE DIVISION
Washington, D.C. 20374-1111
(202) 433-4161

Counsel for Petitioners

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